

USAWC STRATEGY RESEARCH PROJECT

PREEMPTIVE STRIKE AGAINST WEAPONS OF MASS DESTRUCTION: WHO'S THE ROGUE?

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ABSTRACT

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This paper examines the legal doctrine of preemption as applied to the U.S. policy of preventive strikes against weapons of mass destruction possessed by rogue states or terrorist groups. It tracks the development of the doctrine and historical precedents of its application. It seeks to determine when the U.S. would be legally justified in using a preemptive strike, and the likely implications of such use. It proposes a six-pronged test to analyze when a preemptive strike is justified under international law.

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PREEMPTIVE STRIKE AGAINST WEAPONS OF MASS DESTRUCTION: WHO'S THE ROGUE?

"A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction...against the United States...shall be punished by death..."

United States Code, Title 18,
Section 2332a

In 1945 representatives of 51 countries met in San Francisco to draft the charter of the United Nations. In the 20th century the world had suffered the cataclysmic impact of two world wars including over 50 million deaths in World War II alone. The drafters of the UN Charter were determined to control the scourge of state versus state aggression that seemed to be the core of 20th century warfare. They enacted a sweeping ban on the use of force as a lawful instrument of national policy (Article 2(4))¹ with a limited exception for self-defense in the case of an armed attack upon a member nation's territory (Article 51).² Force was also allowed in UN authorized enforcement actions.³ The drafters did not address non-state terrorist organizations or weapons of mass destruction (WMD).

Prior to enactment of the UN Charter, customary international law allowed a nation threatened with imminent attack to take preemptive action to remove the threat. Over the years, legal scholars and commentators have hotly debated whether this customary right to national self-defense exists independently of the apparently narrower rule contained in Article 51. Regardless of the outcome of this debate, a growing body of state practice indicates that in cases of imminent threat, the right of a nation to strike preemptively enjoys wide acceptance. Some authors have suggested that Article 51 itself has been preempted by state practice that has created a new body of customary legal norms.⁴ Other commentators, writing since the September 11 terrorist attacks argue that the United States and the Bush administration are facing challenges in the post-cold war world that are far different than those the international legal system was designed to meet. They believe the system must adapt or be rendered irrelevant.⁵

In September 2002, President George W. Bush struck the death blow against Article 51 of the UN Charter in his National Security Strategy of the United States.⁶ Rejecting the traditional requirement of imminent threat, President Bush declared the intent of the United States to act preemptively:

"The greater the threat, the greater the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent

such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”⁷

The recently issued National Military Strategy of the United States also recognizes the right and intention of the United States to strike preemptively, albeit using slightly more circumspect rhetoric than the National Security Strategy.⁸

This paper will analyze the legality of the U.S. policy of preemptive strike and its implications for the development of international legal norms. It will also discuss the circumstances under which the US might or should use preemption and the likely legal and policy consequences of improper application of the doctrine. As a framework for analysis, the paper will discuss the development of the doctrine of anticipatory self-defense and consider case studies of the Japanese attack on Pearl Harbor in 1941, the Israeli attack on Egypt and other Arab nations in 1967, the Israeli strike on Iraq in 1981, the US attack on Libya in 1986, and the US strikes on Afghanistan and Sudan in 1993. It will then analyze the new US policy in light of these historical examples, customary international law, and UN Charter Article 51. Finally, it will propose a six-pronged test to justify preemptive strikes against weapons of mass destruction.

DEVELOPMENT OF THE DOCTRINE OF ANTICIPATORY SELF-DEFENSE.

Anticipatory self-defense is the doctrine which allows a threatened state to strike first and eliminate the threat before it's attacked. Hugo Grotius, a Dutch legal scholar and widely acknowledged father of international law is credited with the early development of the doctrine. In 1625, he wrote the seminal work on international law entitled The Law of War and Peace.⁹ Grotius believed that even in an anarchic world norms existed that governed the use of force between states. These norms could be determined by express agreement between states (treaties) or by practice (custom).¹⁰ When many states behaved in a certain manner over a sufficient period of time, that behavior became binding as customary law.¹¹ Grotius argued that norms could also be derived by observing nature.¹² He deplored the barbarous practices Christian states had descended to in the 17th Century but recognized that self-defense was a lawful use of force between nations.¹³ He further recognized that a state need not absorb a blow before it could lawfully respond. International law, he said, “permits us to take arms against those who are armed to attack us.”¹⁴

Elihu Root, the founder of the US Army War College, also wrote on the doctrine of self-defense, concluding that states need not suffer an attack before responding with force.¹⁵

The “modern” and most authoritative statement of anticipatory self-defense as customary international law came in 1841 as the result of the “*Caroline* Affair.” The *Caroline* was a United States steamboat running supplies and weapons to Canadian rebels during their uprising against the British in 1837. To prevent further aid being given to the rebels, British forces burned the *Caroline* and dispatched the wreck over Niagara Falls, killing two US nationals. After the uprising was crushed and peace restored, Great Britain acknowledged that the destruction of the *Caroline* was unlawful. In 1841, in a series of diplomatic notes, Daniel Webster, the US Secretary of State, set forth the principles of anticipatory self-defense. First, the act must have been necessary, in that all peaceful means had been exhausted; second, the threat to be preempted must be imminent; and third, the preemptive response must be proportional to the threatened harm.¹⁶ Mr. Webster concluded that for anticipatory self-defense to apply, “[T]he necessity of that self-defense must be instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁷ Under these standards the British actions were unlawful because they had not exhausted peaceful means of settling the dispute. The three prongs of the *Caroline* doctrine, necessity, immediacy, and proportionality became widely accepted among nations and a clear statement of customary international law until the UN Charter was signed in 1945.¹⁸

UN CHARTER ARTICLE 51.

Article 51 caused a major upheaval in the doctrine of anticipatory self-defense. Article 51 states, in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹⁹ This wording has caused extensive debate among nations and legal commentators. The use of the term, “inherent right to self-defense” appears to refer to and codify the customary *Caroline* doctrine that existed prior to 1945. On the other hand, the use of the modifying phrase, “if an armed attack occurs” seems to limit the use of preemptive strikes by requiring a threatened state to wait for an armed attack before it may exercise self-defense. In the case of weapons of mass destruction, requiring a state to absorb the first blow might result in catastrophic losses for that state.

Some commentators have argued that the armed attack requirement is clear and supersedes the customary law existing at the signing of the UN Charter. Many other scholars suggest that Article 51 is unrealistic, is out of step with the vast body of state practice, and has itself been modified by customary law and state practice since 1945.

The weight of evidence supports the view that the customary law of self-defense survived enactment of Article 51. The drafter's choice of the term "inherent" to describe the right of self-defense bolsters this argument. If the drafters had meant to severely restrict a customary right they would have expressly stated so as they clearly did in other sections of the Charter such as Article 2(4).²⁰ An article seeking to recognize and preserve an inherent right would not be used as the mechanism to eviscerate that very right. It is much more logical to conclude that the use of the term "if an armed attack occurs" shows the drafter's views as to the most likely case for self-defense, but not the only one.

Having established that the customary right to self-defense continues to exist, it is useful to flesh out the concept with some historical examples. As will be evident, the requirements under the historical norms are strict and cannot be used as an excuse for aggression. Essentially every military action undertaken since World War II has been justified as self-defense. Where does self-defense end and aggression begin? Each use of a preemptive strike must meet the three-pronged test of necessity, imminence, and proportionality.

PREEMPTIVE STRIKE CASE STUDIES

JAPANESE ATTACK ON PEARL HARBOR.

On December 7, 1941, the Japanese conducted a surprise carrier-borne air strike on the United States Pacific Fleet based at Pearl Harbor, Hawaii. This audacious attack crippled the US Navy in the Pacific and allowed the Japanese to exercise six months of unchallenged initiative before being checked at the battle of Midway. This period of Japanese superiority allowed them to seize critical resources in Southeast Asia, consolidate their control of the Western Pacific, conquer the Philippines, and construct a strong defensive perimeter of island fortresses to defend the Japanese home islands.

The attack and its success shocked the United States and evoked a tide of ill feeling and disgust towards the Japanese and their "unprovoked and dastardly attack."²¹ Although unstated at the time, perhaps the only major figure in the west relieved by the attack was Winston Churchill who was privately pleased (as he expressed in his post-war memoirs) to gain such a powerful ally as the US.²²

It is unclear whether the Japanese government formally considered the requirements of customary international law before attacking Pearl Harbor, but it is clear that they felt they had no choice but to go to war with the United States. Japan was a resource poor island nation dominated by a ruling military elite bent on expanding their empire by force. The United States with its large Pacific Fleet and territorial possessions in the Pacific region was the only major

country with the power to block this expansion. Japan was totally dependent upon imported resources, particularly oil, to maintain its population and war making capability. Ironically, it received virtually all of its oil from the United States. In 1936 Japan invaded Manchuria and set the stage for almost certain conflict with the US. In early 1941, the United States imposed an oil embargo on Japan conditioned on Japan's withdrawal from Manchuria. At the same time, the US moved its Pacific Fleet from California to Pearl Harbor, 3000 miles closer to Japan. The Japanese began planning for an attack.

The Japanese government knew they were a much less powerful country than the United States. By late 1941 they had only six months of reserve oil remaining. They could easily seize large oil reserves in the Dutch East Indies, but such overt aggression would likely provoke war with the United States.²³ Withdrawal from Manchuria and the abandonment of four years of gains was equivalent to national surrender and was not an option for the militaristic government. War with the US was inevitable. To the Japanese, the United States had blocked their national aims at empire, threatened them with economic ruin and starvation with its oil embargo, and moved the Pacific Fleet into the mid-Pacific as a clear threat. They had little hope in winning a total war with the US, but their best chance lay in crippling the Pacific Fleet in a surprise strike that would allow them to seize resources and build up defenses so strong that the US would agree to peace terms maintaining the status quo.²⁴ Despite this reasoning, the attack on Pearl Harbor fails to meet any of the three prongs necessary for the valid exercise of self-defense under customary international law.

Necessity. The Japanese strike on Pearl Harbor was not necessary because they could have resolved the dispute peacefully. Had they withdrawn their forces from Manchuria or showed any willingness to reach a settlement, the US was prepared to resume oil shipments. That the Japanese were unwilling to give up their illegal war of aggression in Manchuria does not make a preemptive strike to support the illegal war valid or necessary under customary international law. In fact, the US actions were justified as reasonable acts of collective defense with China, a US ally.

Imminence. The US was at peace with Japan and had no plans to initiate hostilities. The Japanese did not believe that a US military attack was contemplated. They feared the US Pacific Fleet's advanced basing at Pearl Harbor only as a threat if they began active military operations in the Dutch East Indies or elsewhere in the Pacific. Ironically, the US moved the fleet to Pearl Harbor as a deterrent to Japan's aggressive expansion,²⁵ but Japan viewed it as a threat to be eliminated. This is an example of a failed deterrence strategy that made the use of

force more likely. This lesson has relevance for President Bush's announced strategy of preemption and will be revisited later in this paper.

Proportionality. Even assuming that the US posed an imminent threat to Japan, the attack on Pearl Harbor was not a proportionate response. Attempting to destroy an entire fleet using hundreds of strike aircraft and killing thousands of people is far out of proportion to the economic and diplomatic pressure the United States placed on Japan in an effort to contain their aggression in Manchuria.

Japan's actions at Pearl Harbor were a classic case of an illegal preemptive strike. They galvanized US and world opinion against the Japanese and filled the United States with an unshakable resolve to pursue the war against Japan to total surrender. Japan ensured its destruction and untold misery for its population by pursuing the preemptive attack.

ISRAELI ATTACK ON EGYPT, SYRIA, AND JORDAN IN 1967.

In June 1967, Israel preemptively attacked and destroyed the Egyptian Air Force, followed shortly by the air forces of Syria and Jordan. In a six day lightning ground campaign the Israeli Defense Forces captured the Sinai Peninsula, the Golan Heights, the Gaza Strip, the West Bank of the Jordan River, and the Jordanian controlled sections of Jerusalem. Because Israel was a small country lacking strategic depth (only 40 miles wide at its narrowest point) the use of preemptive strikes was a widely publicized part of Israeli national security strategy.²⁶ Although a preemptive strike was expected by Egypt, Israel was able to achieve surprise through exhaustive planning and effective deception.

In the United Nations, Israeli Ambassador Abba Eban declared that Israel had invoked the provisions of Article 51 permitting member states to act in self-defense.²⁷ The Israeli action was denounced in the UN as illegal aggression,²⁸ yet the debate was much influenced by cold war politics since Egypt and Syria were strongly allied with The Soviet Union and Israel was backed by the United States.²⁹ Analyzed dispassionately under the three-pronged customary international law norm the attack was valid.

Necessity. In the months preceding the 1967 war the anti-Israel rhetoric by Arab leaders, particularly Egyptian President Gamel Abdul Nasser, intensified dramatically. President Nasser openly called for the destruction of Israel through armed attack.³⁰ He formed a unified command of Arab military units aimed at achieving overwhelming superiority. He closed the straights of Tiran to Israeli cargo. Finally, he ordered the UN Sinai peacekeepers to leave on 24 hours notice³¹ and moved a strong Egyptian armored force into the Sinai within striking distance of Israel. Given its lack of strategic depth, the clear threat to its national

survival, and the exceedingly low probability of achieving a peaceful settlement, Israel was justified in believing its preemptive action was necessary.

Imminence. The escalated anti-Israeli rhetoric, the summary removal of UN peacekeepers, the closing of the Straits of Tiran, and the positioning of strong Egyptian forces in the Sinai justified Israel in concluding that armed attack on three fronts was imminent.

Proportionality. The Israeli attack was massive, but considering the clear threat to national survival, was proportionate. Israel had a population of less than three million compared to the Arab worlds 400 Million. Still, Israel stopped its offensive after six days (albeit under heavy international pressure) and did not advance on any Arab capital city although it clearly could have occupied Damascus and Amman with ease.

The Israeli preemptive strike in 1967 is a classic case of a valid exercise of anticipatory self-defense under customary international law. Although initially criticized as aggression under the UN Charter and not proper under the constraints of the Article 51 right of self-defense, subsequent state practice shows a broader acceptance of the Israeli action.

ISRAELI ATTACK ON OSIRAK (IRAQ) NUCLEAR SITE IN 1981.

In 1981, Iraq was nearing completion of a nuclear reactor facility located at Osirak near Baghdad. The facility was constructed with Italian assistance using French supplied nuclear materials. Iraq had not signed an armistice agreement with Israel following the 1948 War of Independence, and was technically still in a state of war with Israel.³² Iraqi President Saddam Hussein openly spoke of his desire to produce nuclear weapons to use against Israel.³³ On 7 June 1981, Israel bombed the nuclear site with eight F-16 aircraft newly acquired from the United States, supported by six F-15 fighters also supplied by the US. The F-16s carried a total of 16 US supplied 2000 pound bombs (two per aircraft). The attack was timed for a period when the Israelis believed no one was at the site. All 16 bombs penetrated the reactor dome causing its total destruction. Only one person was killed, an Italian contractor. The Israeli strike achieved total surprise and all aircraft returned safely to Israel.³⁴

The attack occurred after several years of concern and debate in the Israeli government and after an unsuccessful air strike on the same facility by Iran.³⁵ Israel unsuccessfully attempted to convince the French and Italian governments to cease their support for the program. Israel also allegedly undertook (with only partial success) a harassment and intimidation campaign against foreign engineers and technicians to scare them away from the project. Israeli intelligence estimated that at the time of the attack, the facility was within three months of becoming operational.

Necessity. Israeli Prime Minister Menachim Begin defended the attack as a “moral act of self-defense.”³⁶ He declared that as a policy of national survival, “under no circumstances will we allow an enemy to develop weapons of mass destruction against our people.”³⁷ The key issue under the necessity prong is whether Iraq intended to produce nuclear weapons to use against Israel. Iraq’s president was an unpredictable and brutal dictator. He was technically in a state of war with Israel and there was evidence that he openly declared his intention to use nuclear weapons against Israel. On the other hand, Israel was widely believed to have a substantial nuclear stockpile which could be used to deter Iraqi attack. Israel attempted to resolve the issue peacefully by using diplomacy with Iraq, France, and Italy.

Imminence. This part of the three prong test is the most difficult for Israel to meet. Most members of the world community in 1981 felt that the threat to Israel by the Iraqi Osirak facility was speculative.³⁸ It was not clear that Iraq would be able to produce weapons grade nuclear material at the site, produce functioning weapons, and properly deliver them. Even if they could do these things the threat would be well in the future and certainly not imminent. Israel countered that the plant was within three months of becoming operational, at which time an attack would be inconceivable because of the potential catastrophic impact to Baghdad from radiation released from the destroyed site. In effect, Israel made the novel argument that complying with the proportionality prong of the *Caroline* doctrine forced it to attack immediately.

Proportionality. Israel went to great lengths to minimize collateral damage and casualties. The F-16 was chosen as the strike aircraft because it had the most advanced bomb guidance system available. The air strike was highly precise and the reactor building was the only structure damaged. No radiation was released and only one person was killed. The Israeli response was narrowly tailored to address the threat posed.

The Osirak attack was almost universally condemned by the international community, including the United States. The UN Security Council issued Security Council Resolution 487 which found that Israel had violated the prohibition on the use of force contained in Article 2(4) of the UN Charter and “strongly condemn[ed] the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”³⁹ As mentioned above, most nations felt that Israel could not show an imminent threat from Iraq that would justify the drastic remedy of preemptive strike. Interestingly, by mentioning both the UN Charter and the norms of international conduct, the Security Council recognized a violation of both treaty law and customary international law and gave support to the argument that the *Caroline* doctrine of anticipatory self-defense survived enactment of the UN Charter.

The Osirak case holds much significance for analyzing President Bush's new policy of preemptive strikes against weapons of mass destruction possessed by rogue states. Although the United States condemned the attacks at the time, it now seems clear that the US would countenance such strikes where deterrence would be ineffective against a rogue state, or where the target state might provide weapons of mass destruction to terrorists. It also shows a possible shift in customary international law as states grapple with ways to address the threat of weapons of mass destruction proliferation. International law is dynamic and must adapt to changed times. Ironically, one author commented in a retrospective analysis of the Osirak attack that Kuwait and Saudi Arabia were the biggest beneficiaries of the Israeli action because the United States might have refused to intervene in the Gulf War of 1991 if Iraq had possessed nuclear weapons.⁴⁰ With the limited exception of India and Pakistan, no nation with nuclear weapons has ever fought a conventional war against another nuclear power.

UNITED STATES ATTACK ON LIBYA IN 1986 (OPERATION EL DORADO CANYON).

During the early morning hours of 14 April 1986, United States Air Force F-111 aircraft flying from bases in England and US Navy A-6 bombers operating from aircraft carriers in the Mediterranean bombed six targets in Libya.⁴¹ The raid lasted 11 minutes and killed approximately 100 Libyans. One of the targets bombed was the Aziziyah Barracks where Libyan leader Colonel Muammar Gadaffi and his family lived. Several bombs struck Gadaffi's house including one which landed immediately outside his front door.⁴² Gadaffi was emotionally shaken but uninjured. His 16 month old adopted daughter was killed and two of his sons wounded.⁴³

The raid followed a period of heightened tension between Libya and the United States culminating in the terrorist bombing of a Berlin discotheque on 5 April 1986 that killed two Americans. US intelligence intercepts linked Libya with the Berlin attack. The US justified its attack on Libya as an exercise of self-defense under the UN Charter, Article 51, claiming that Libya had engaged in an armed attack on Americans.⁴⁴ President Reagan said, "Today, we have done what we had to do. If necessary we shall do it again."⁴⁵

Necessity. The US theory was that the raid on Libya was necessary to deter and prevent future terrorist incidents sponsored by Colonel Gadaffi. The bombing of Gadaffi's living quarters during normal sleeping hours indicates that a regime change was an important goal of the attack as well.

Imminence. The Libyan attacks may be closer to a reprisal under international law than to anticipatory self-defense because the discotheque bombing occurred prior to the attack.

Many writers argue that International law does not permit the use of force for reprisal or retaliation.⁴⁶ Still, the US was justified in feeling that unless strong action was taken to punish Gadaffi other Libyan terrorist acts were imminent.

Proportionality. The raid was a limited response to the premeditated bombing of an establishment known to be heavily frequented by US soldiers. The attack was planned to minimize civilian casualties by using precision guided munitions. The attack was narrowly tailored to send a message to the Libyan leadership and to other nations that the US would not tolerate further Libyan sponsored terrorist acts.

Operation El Dorado Canyon is a significant case in the development of anticipatory self-defense because it set the precedent of using limited force to prevent future attacks following a state sponsored terrorist incident.⁴⁷ It also set the precedent for treating a terrorist incident directed against Americans outside of the United States as an armed attack against the US under Article 51. Although denied by the US, it may have been an attempt to effect regime change of a rogue state through preemptive strike. The attack received muted criticism in the UN, and a Security Council resolution condemning the US action was defeated by a vote of 9 to 5.⁴⁸ State practice was evolving to allow the use of force far beyond what was contemplated by the framers of the UN Charter in 1945.

UNITED STATES ATTACKS ON AFGHANISTAN AND SUDAN IN 1998.

On August 7, 1998 the US embassies in Kenya and Tanzania were bombed by terrorists causing over 250 deaths (including 12 Americans) and thousands of injuries.⁴⁹ The United States claimed it had compelling evidence linking Osama bin Laden and his terrorist network al Qaeda to the attack although it never disclosed the specific evidence.⁵⁰ On August 20, 1998, President Clinton ordered 79 Tomahawk cruise missile strikes against an al Qaeda training camp in Afghanistan and a pharmaceutical plant in the Sudan allegedly producing chemical weapons for bin Laden.⁵¹ The US probably hoped that the elusive bin Laden would be killed by a fortuitous hit.

Necessity. The US justified the attacks as preemptive strikes necessary to prevent bin Laden from engaging in further acts of terrorism. This is a significant expansion of the anticipatory self-defense doctrine. Unlike Libya in 1986, there was no evidence that Afghanistan or The Sudan sponsored the embassy bombings. Rather, the argument was that they aided and abetted the attacks by allowing their territory to be used by al Qaeda and thus were culpable as accessories. This position had been previously rejected by the International Court of Justice in *Nicaragua v. United States of America* where the court ruled that providing

assistance and support to terrorist groups and allowing them to operate within a nation did not constitute an armed attack against a country targeted by the terrorist organization.⁵² To constitute an armed attack the sponsor nation must have pervasive control over the terrorist group. Although International Court of Justice opinions do not have formal precedential effect, they are indicators of the state of international law. The *Nicaragua* opinion is poorly reasoned and overly restrictive. To allow a state to purposely provide sanctuary to large terrorist operations and retain legal immunity from a target state's preventive action is out of step with modern state thinking and was rightfully rejected by the United States.

Imminence. Like Operation El Dorado Canyon, the US strikes against al Qaeda in 1998 occurred in response to a terrorist attack and was justified under a self-defense theory of preventing future attacks. There were significant elements of reprisal and retaliation as well. The United States was involved in a continuing struggle with a well-organized terrorist group that engaged in a series of attacks against US citizens and interests. Bin Laden openly declared his intent to conduct further attacks until the US withdrew from the Middle East. Al Qaeda had demonstrated the ability to successfully conduct attacks in diverse regions and nations. Even without hindsight the United States was justified in concluding that Al Qaeda posed an imminent threat.

Proportionality. The US response consisted of attacks on two remote sites with a total of 79 precision guided conventional warheads. Civilian casualties (approximately 21 people killed and injured) were dwarfed by the massive innocent loss of life in Kenya and Tanzania. Although characterized by the then ruling Taliban regime in Afghanistan as "Killing a fly with a cannon"⁵³ the US attacks met the standards of customary international law for proportionality.

The US attacks met with criticism from legal scholars complaining about the expansion of the self-defense doctrine but with remarkably little opposition from the international community.⁵⁴ Customary international law was expanding to allow proportional attacks against terrorist groups operating from safe haven sanctuary in rogue states.

CONCLUSIONS FROM CASE STUDIES.

The results of the case studies are summarized in Table 1:

<i>Case Study</i>	<i>Target of Preemption</i>	<i>Valid Under Art. 51</i>	<i>Valid Under Cust. International Law</i>
Pearl Harbor 1941	State	No (predates Art. 51)	No
Egypt 1967	State	No	Yes
Osirak (Iraq) 1981	State acquiring WMD	No	No (in 1981)
Libya 1986	State using terrorists	No	Yes
Afghanistan 1998	State aiding terrorists	No	Yes

TABLE 1

The case studies show the development since 1941 of the customary international law of anticipatory self-defense. They also clearly demonstrate the irrelevance of Article 51's armed attack requirement in light of actual state practice. One obvious solution is to change Article 51 to reflect the realities of the post-cold war world. Realistically, the prospects for meaningful change to a politically charged subject such as anticipatory self-defense are remote. Absent such change, states will continue to ignore Article 51 and apply their own analysis of customary international law. The requirements of the 1841 *Caroline* doctrine (necessity, imminence, and proportionality) still apply today but have been adapted to deal with modern realities of weapons of mass destruction, state-sponsored terrorism, and stateless terrorism.

The most difficult analysis of any of the case studies is the Israeli attack on Osirak in 1981. This attack was universally condemned by the international community including the US, but now appears well within the 2002 US National Security Strategy definition of proper self-defense. Has customary law changed since 1981 to allow this type of attack or does the new US policy violate international law? This paper will now analyze the new United States National Security Strategy policy of preemptive strike under customary international law.

THE 2002 UNITED STATES NATIONAL SECURITY STRATEGY AND THE BUSH DOCTRINE ON PREEMPTIVE FORCE.

“No advance in the art of legal drafting can bridge the enormous gulf that divides the international community over what constitutes acceptable use of force.”⁵⁵

Michael J. Glennon⁵⁶

As stunned observers watched the World Trade Center collapsing into smoky ruin few realized they were also witnessing the final collapse of the United Nations’ use of force regime. Already weakened by post cold war pressures unimaginable to the drafters of the UN Charter, including weapons of mass destruction proliferation, widespread ethnic cleansing, and global terrorism of apocalyptic dimensions, the September 11 attacks prompted the Bush administration to reject the conservative UN interpretation of the use of force in self defense.⁵⁷ The US would not rely on cold war deterrence and reserved the right to strike preemptively against rogue states and terrorist groups even where the US could not demonstrate an imminent threat.⁵⁸ The Bush Doctrine contains six essential arguments.⁵⁹

- The United States cannot rely on deterrence against risk tolerant rogue states and terrorist groups that are unmoved by mass casualties.
- Weapons of mass destruction are weapons of first choice--not last resort for rogue states and terrorist groups seeking to counter US conventional superiority.
- There is an overlap between states that sponsor terror and those that seek WMD.
- There is no distinction between terrorist groups and states that harbor them.
- Traditional international legal norms such as the requirement of imminent threat must be adapted to the realities of new threats and enemies.
- The risk of inaction is so great (there are no adequate defenses) that the US will act preemptively as it sees fit.

The National Security Strategy does not give even passing mention to the Charter of the United Nations, the Article 2(4) prohibition on the use of force, or the Article 51 rule on self-defense. The United States declared what most countries already knew, the UN use of force rules are no longer binding. This is not overtly shocking since it reflects the growing body of state practice since 1945. The United States goes much further by rejecting one of the essential tenets of customary international law contained in the *Caroline* doctrine, that of

imminence. The final sentence of the Bush Doctrine states, "The reasons for our actions will be clear, the force measured, and the cause just."⁶⁰ No mention is made of imminence. Thus the United States propounds a new *Caroline* doctrine requiring only necessity and proportionality before using anticipatory self-defense.

APPLICATION OF THE BUSH DOCTRINE.

As the world's sole superpower, pronouncements such as the Bush Doctrine have enormous impact on customary international law and state practice. Given the death of the United Nations' use of force paradigm, and the almost complete lack of consensus among states as to appropriate norms,⁶¹ many nations are likely to seize upon the Bush Doctrine to justify their military actions. India v. Pakistan, and Russia v. Chechnya are two possible examples.

Use against terrorist groups. The Bush Doctrine enjoys its greatest legal validity when used to justify preemptive strikes against terrorist groups. The United States rightfully rejects the nonsensical protections given to states that harbor terrorists by the International Court of Justice in *Nicaragua v. United States*.⁶² Clearly, the US will strike terrorists wherever located and states which support or sponsor them assume the risk of attack. The United States also reserves the right to force regime changes in such states as witnessed recently by the rapid departure of the ruling Taliban party in Afghanistan in 2002. The United Nations post-September 11 resolutions did not authorize the use of force in Afghanistan, yet the US actions enjoyed widespread international support. Previous US attacks in Libya, Afghanistan, and The Sudan were not seriously opposed by the global community. Customary international law has evolved to accept this counter-terror practice.

Use against rogue states acquiring or possessing weapons of mass destruction. Rogue states are despotic risk taking states unconstrained by accepted norms of international behavior.⁶³ Current US cited examples are "axis of evil" members Iran, Iraq, and North Korea. The Bush Doctrine allows preemptive strikes against such states to prevent them from acquiring or using weapons of mass destruction even in the absence of a clearly demonstrated imminent threat.⁶⁴ This is a substantial expansion of customary international law and reflects the United States' influential position as sole superpower, world hegemon, and largest victim of mass terrorism in modern history.

RISKS OF THE BUSH DOCTRINE.

The primary risk of the Bush Doctrine is in its aggressive application to rogue states seeking to acquire weapons of mass destruction where the United States cannot show an imminent threat. Preemptive strikes lack legitimacy to the world community and risk isolating the US in an increasingly hostile international environment. Some have described this prospect as the US becoming a “lonely hegemon.”⁶⁵ The US policy might provoke a backlash effect where nations band together to confront and contain aggressive American policy.

As the largest global economy, the US has a vital interest in ensuring international order and trading stability. The unconstrained use of force by nations citing the Bush Doctrine as justification for their own adventures would erode traditional international norms of behavior and pose a serious threat to the United States economy. The United States would be ill-placed to condemn others exercising similar policies of preventive war. The Bush National Security strategy pays scant attention to this destabilizing impact other than the simple statement, “[N]or should nations use preemption as a pretext for aggression.”⁶⁶ How would the US respond to a widespread preemptive strike by India against Pakistani nuclear facilities implicitly endorsed by application of the Bush Doctrine?⁶⁷

Ironically, the widely publicized and debated Bush Doctrine may encourage the use of the weapons of mass destruction it is designed to prevent.⁶⁸ A nation anticipating a US preemptive strike might use WMD rather than risk losing them.

The US National Security Strategy claims that “The United States will not use force in all cases to preempt emerging threats.”⁶⁹ Yet it is difficult to see how distinctions can be drawn among rogue states. If Iraq why not Iran? If Iran why not North Korea? The US could enter a phase of almost perpetual war, draining its resources and further isolating it from the international community.

Finally, application of the Bush Doctrine threatens deeply held US national values.⁷⁰ Examining the outrage and hatred directed toward Japan after their preemptive strike at Pearl Harbor shows how abhorrent preventive war is to many Americans.⁷¹ Would America support one or more costly preventive wars where the threat to the US is not overtly demonstrable?⁷² In its zeal to confront rogue nations, might the United States itself become one?

WHO IS THE ROGUE?

“Now Peace and Law, I bid you both farewell.”

Julius Caesar on crossing the Rubicon⁷³

“Rogue--No longer obedient, belonging, or accepted and hence not controllable or answerable.”

Random House Unabridged Dictionary⁷⁴

The United States is not a rogue nation. Yet in the aftermath of the failure of the United Nations’ use of force paradigm and the trauma of the September 11 terrorist attacks, the US has propounded a doctrine that, if executed to the extreme, violates long standing principles of international law. The absence of international consensus about the use of force in anticipatory self-defense magnifies the effect of US action and establishes new norms of customary behavior. If the United States, perhaps the most dominant nation in history, ceases to be answerable to the community of nations, the consequences for international order could be disastrous.

One approach, suggested by Professor Glennon, is to replace the *Caroline* doctrine with a new three-pronged test for use against rogue states possessing or developing weapons of mass destruction.⁷⁵ A preemptive strike is justified when a target state:

- “has developed the capability of inflicting substantial harm upon another,
- [has] indicated explicitly or implicitly its willingness or intent to do so,
- to all appearances is only waiting for the opportunity to strike.”

This test is a valid attempt to grapple with the problem of applying the *Caroline* doctrine to weapons of mass destruction, but falls far short. First, Professor Glennon’s test only deals with nations that have already developed a weapons of mass destruction capability. It does not address a rogue nation seeking to develop such weapons. Second, the “waiting for the opportunity to strike” standard appears to be the *Caroline* imminence requirement rewritten, which the Bush administration has rejected. Finally, the test does not require proportionality in the response, a basic principle of international law. Something more is needed to decide when a nation may invoke anticipatory self-defense to attack a rogue state’s weapons of mass destruction capability.

I propose a more useful test. A preemptive strike against weapons of mass destruction is justified where a state:

- has disregarded clearly established customary international norms or treaties dealing with weapons of mass destruction, used weapons of mass destruction against civilian populations, deceived the international community about its possession of weapons of mass destruction, or supported or sponsored terrorism, and
- has developed a credible weapons of mass destruction capability and the means to deliver them or has substantially advanced programs to develop these capabilities (operational within two years), and
- has rejected demands by the international community, the United Nations, or the target state to remove the weapons, or cease their development under international supervision, and
- has indicated explicitly or implicitly its willingness or intent to use weapons of mass destruction [from Professor Glennon's test], and
- a target state reasonably believes that its national survival or essential way of life is at grave risk from the threat of weapons of mass destruction attack within two years, and
- any preventive action taken by a target state is proportional to the harm to be prevented, uses the minimum degree of force necessary to remove the threat, and minimizes civilian casualties and property destruction.

This test, although far from perfect, has a number of advantages. It is narrowly tailored and applies only in extraordinary situations. It respects traditional international norms and avoids the dangerous precedent setting impact of an unconstrained Bush doctrine. It respects traditional American values by requiring notice to the offending state and an overt refusal to comply before preventive action is taken. It requires proportional responses that minimize civilian damage. It provides a bright line rule (two years from operational capability) for when a state developing weapons of mass destruction may be targeted. Finally, it recognizes emerging state practice in the post-cold war world and provides a strong basis for the development of modern and more realistic customary international norms. A state complying with these six prongs can hardly be a rogue.

CONCLUSION.

The idealistic use of force rules that the United Nations adopted in 1945 have failed. In their wake is a remnant of surviving customary international law and an almost total lack of consensus among states as to what constitutes proper use of force in the post-cold war era—especially preventive force. The United States in its 2002 National Security Strategy propounds

an aggressive preemption strategy that exceeds the limits of traditional international law. The strategy is proper when applied to terrorist groups and states that sponsor or support them and will come to be accepted as a new norm of customary international law. When applied to rogue states possessing or acquiring weapons of mass destruction, the Bush doctrine goes too far by ignoring the imminent threat requirement. Risks include: setting dangerous precedents, eroding respect for international norms, alienating US allies, violating traditional American values, and exhausting the United States in perpetual war. In following this doctrine to its logical end, the US could become a rogue.

To avoid these problems, this paper proposes a six-pronged modification of customary international law for dealing with preemptive strikes against weapons of mass destruction capabilities. The test allows proportional strikes against rogue states posing grave threats to the national survival of target states after notice and refusal to remove the weapons. This test could become the basis for a new norm of customary international law that restores consensus in the international community, safeguards nations from weapons of mass destruction, and preserves American moral leadership.

WORD COUNT = 7114

ENDNOTES

¹ United Nations, Charter of the United Nations, Chapter I, Article 2(4), (1945).

² United Nations, Charter of the United Nations, Chapter VII, Article 51, (1945).

³ United Nations, Charter of the United Nations, Chapter VII, Article 42, (1945).

⁴ See Emanuel Gross, "Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens," Temple International and Comparative Law Journal (Fall 2001): 15 *Temp. Int'l & Comp. L.J.* 195 [database on-line]; available from Lexis-Nexis; accessed 14 November 2002. See also Guy B. Roberts, "The Counter Proliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction," Denver Journal of International Law and Policy (Summer 1999): 27 *Denv. J. Int'l L. & Pol'y* 483 [database on-line]; available from Lexis-Nexis; accessed 14 November 2002. See also Louis R. Beres, "Israel After Fifty: The Oslo Agreements, International Law and National Survival," Connecticut Journal of International Law (Summer 1999): 14 *Conn. J. Int'l L.* 27 [database on-line]; available from Lexis-Nexis; accessed 14 November 2002.

⁵ Michael L. Bonafede, "Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks," Cornell Law Review (November 2002): 88 *Cornell L. Rev.* 155, 158 [database on-line]; available from Lexis-Nexis; accessed 14 November 2002. See also John A. Cohan, "Formulation of a State's Response to Terrorism and State-Sponsored Terrorism," Pace International Law Review (Spring 2002): 14 *Pace Int'l L. Rev.* 77, 100 [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

⁶ George W. Bush, The National Security Strategy of the United States (Washington, D.C.: The White House, September 2002), 13.

⁷ *Ibid.*, 15.

⁸ Meyers, Richard B, The National Military Strategy of the United States of America (Washington, D.C.: September 2002), 12.

⁹ Hugo Grotius, Prolegemena to the Law of War and Peace, (Indianapolis: Bobbs-Merrill, 1957), ix.

¹⁰ Malcom N. Shaw, International Law, 4th ed. (Cambridge: Cambridge University Press, 1999), 57.

¹¹ Hugo Grotius, The Rights of War and Peace in Three Books, (London: Innys, 1738, original published in Latin in 1625).

¹² *Ibid.*, 27. "This is not a written [law] but a law born with us, which we have not learned, received, or read, but taken and drawn from nature itself."

¹³ *Ibid.*, 27. "If our own lives be brought to danger by force or fraud either by robbers or enemies, all means that we can use for our own preservation are fair and honest." See *Ibid.*,

131. If a man is assaulted in such a manner that his life shall appear in inevitable danger, he may not only make war upon but may destroy the aggressor.”

¹⁴ Ibid., 26.

¹⁵ Roberts, 505.

¹⁶ Sean M. Condon, “Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox,” Military Law Review (September 1999): 161 Mil. L. Rev. 115, 130 (quoting letter from Mr. Webster, United States Secretary of State (Aug. 6, 1842)), [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

¹⁷ Ibid.

¹⁸ Grotius also endorsed necessity, proportionality, and imminence. See Grotius, 132 for a discussion of necessity, Grotius, 133 for imminence, “Yet while we have nothing to fear for the present...I maintain that we cannot lawfully kill him...even if it does not then sufficiently appear that it may be avoided. For time gives frequent opportunity for remedy,” and Grotius, 517 for proportionality, “All manner of violence and force [is permissible] provided that they exceed not the bounds of equity, but bear a proportion to the offense committed.”

¹⁹ United Nations, Charter of the United Nations, Chapter VII, Article 51, (1945).

²⁰ United Nations, Charter of the United Nations, Chapter I, Article 2(4), (1945). “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”

²¹ Franklin D. Roosevelt, (December 8, 1941).

²² Winston S. Churchill, The Second World War: Vol. III, The Grand Alliance. (London: Houghton Mifflin, 1950), 608. “The United States is like a gigantic boiler. Once a fire is lighted under it there is no limit to the power it can generate. Being saturated and satiated with emotion and sensation, I went to bed and slept the sleep of the saved and thankful.”

²³ Gordon W. Prange, At Dawn we Slept: The Untold Story of Pearl Harbor (Norwalk, CT, Easton Press, 1981) 174-178.

²⁴ Ibid., 14.

²⁵ Ronald H. Spector, The Eagle Against the Sun: The American War with Japan (Norwalk, CT: Easton Press, 1985), 1. The commander of the Pacific Fleet in 1940, Admiral James O. Richardson, thought basing the fleet at Pearl Harbor was a dangerous idea. He complained so often and so intensely that he was relieved of his command after one year and replaced with the ill-fated Admiral Husband Kimmel in 1941. Other than Admiral Richardson, it appears that nobody seriously thought the Japanese were capable of attacking Pearl Harbor.

²⁶ Efraim Inbar, "Israeli National Security, 1973-96," The Annals of the American Academy of Political and Social Science (January 1998): 555 *Annals* 62, 71 [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

²⁷ Hal Kosut, ed. Israel & the Arabs: The June 1967 War (New York: Facts on File, 1968), 70.

²⁸ United Nations, Security Council Resolution 242, (1967).

²⁹ A. Mark Weisburd, Use of Force: The practice of States Since World War II (University Park, PA: Pennsylvania State University Press, 1998), 138.

³⁰ *Ibid.* 136.

³¹ Kosut, 45. British Foreign Secretary George Brown remarked, "It really makes a mockery of the peace keeping force of the United Nations, if, as soon as tension rises, the UN Force is told to leave."

³² Anthony D'Amato, "Israel's Air Strike Against the Osiraq Reactor: A Retrospective," Temple International and Comparative Law Journal (Spring 1996): 10 *Temp. Int'l & Comp. L.J.* 259, 261 [database on-line]; available from Lexis-Nexis; accessed 14 November 2002.

³³ Dan McKinnon, Bulls-eye Iraq (New York: Berkley Books, 1987), 40.

³⁴ *Ibid.*, 196. Upon landing, the F-16s had less than 15 minutes of fuel remaining after the 3 hour mission.

³⁵ Uri Shoham, "The Grenada Intervention: The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense," Military Law Review (Summer 1985): 109 *Mil. L. Rev.* 191 [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

³⁶ McKinnon, 206.

³⁷ Arnold Beichman, "Israel's Right to Self-Defense," The Washington Times, February 9, 1998, sec. A, p. 15.

³⁸ Condron, 138.

³⁹ United Nations, Security Council Resolution 487, (1981). Despite the harsh language, the United States ensured there were no teeth in the resolution and no enforcement action was taken against Israel. The United States briefly held up a shipment of F-16 aircraft pending a review of whether Israel had violated their agreement to use the aircraft in defensive operations only. The UN also passed a resolution calling for an arms embargo on Israel by a vote of 109-2-34. See Weisburd, 288.

⁴⁰ D'Amato, 259.

⁴¹ Weisburd, 294. Weisburd argues that the US chose to provoke a confrontation with Libya over freedom of navigation to justify a strike rather than rely on Libya's terrorist connection. See *also*, Condon, 155.

⁴² George Tremlett, Gadafi: The Desert Mystic (New York: Carroll & Graf, 1993), 18.

⁴³ Geoff Simons, Libya: The Struggle For Survival (New York: St. Martin's Press, 1993), 318.

⁴⁴ Condon, 156. In this case the armed attack occurred outside the United States in the sovereign nation of West Germany. The US took an expansive view of Article 51 by claiming that the attack was directed at US citizens. United States allies in Europe (except the UK) were unhappy but did not go so far as to openly condemn the attack.

⁴⁵ Tremlett, 258. Even though the United States justified the attack on Libya under Article 51, President Reagan's use of the term "necessary" reinforces the US position that customary international law also justifies anticipatory self-defense. The US did not claim the attack was retaliation.

⁴⁶ Bonafede, 177 (quoting Stuart S. Malawar, "Reagan's Law and Foreign Policy, 1981-1987: The Reagan Corollary of International Law," Harvard International Law Journal (1988): 29 Harv. Int'l L.J. 85, 102.

⁴⁷ Federica Bisone, "Killing a Fly With a Cannon: The American Response to the Embassy Attacks," New York Law Journal of International & Comparative Law (2000): 20 N.Y.L. Sch. J. Int'l & Comp. L. 93, 105 [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

⁴⁸ Condon, 156.

⁴⁹ Bisone, 93.

⁵⁰ *Ibid.*, 111. Revealing the evidence linking bin Laden to the embassy attacks might compromise the US ability to take remedial measures. There is often a tension between disclosing enough evidence to justify a military strike while not compromising sources and methods of intelligence collection.

⁵¹ Bonafede, 178. President Clinton justified the attacks to prevent the "imminent threat to national security." In a foreshadowing of the Bush doctrine, the Secretary of Defense, William Cohen, warned terrorists that the US would not be limited to "passive defense."

⁵² Nicaragua v. United States of America. I.C.J. Reports 1984, 427.

⁵³ Bisone, 111.

⁵⁴ *Ibid.* The moderate Pakistani government which supported the Taliban was placed in an uncomfortable spot between its people who protested against the US attacks and its need for international aid.

⁵⁵ Michael J. Glennon, "Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter," *Harvard Journal of Law & Public Policy, Inc.* (Spring 2002): 25 Harv. J.L. & Pub. Pol'y 539, 558 [database on-line]; available from Lexis-Nexis; accessed 8 November 2002.

⁵⁶ Fellow, Woodrow Wilson International Center for Scholars (2001-2002); Professor of Law, University of California, Davis School of Law.

⁵⁷ Bush, 15.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.* In declaring that there is no difference between terrorists and the states that harbor them, the United States is expressly rejecting the International Court of Justice opinion in *Nicaragua v. the United States*.

⁶⁰ *Ibid.*, 16. President Bush mentions necessity twice and proportionality once.

⁶¹ Glennon, 554. "So many states have used force with such regularity in so wide a variety of situations that it can no longer be said that any customary norm of state practice constrains the use of force."

⁶² *Nicaragua v. United States of America*. I.C.J. Reports 1984, 427.

⁶³ The ideas in this paragraph are based, in part, on remarks made by a speaker participating in the Commandant's Lecture Series.

⁶⁴ Bush, 15-16.

⁶⁵ The ideas in this paragraph are based, in part, on remarks made by a speaker participating in the Commandant's Lecture Series.

⁶⁶ Bush, 15.

⁶⁷ Australia recently announced a policy of preemption following the terrorist bombing of a nightclub frequented by Australians in Bali, Indonesia. See note 62.

⁶⁸ "UN Inspectors Leave North Korea," 28 December 2002; available from http://www.dw-world.de/english/0,3367,4789_W_723382,00.html; Internet; accessed 2 January 2003. "North Korea said it decided to resume its controversial nuclear program after the U.S. called the country part of an 'axis of evil' and a target for a nuclear preemptive strike."

⁶⁹ Bush, 15.

⁷⁰ Patrick O'Neill, "100 Ethicists Oppose Attack on Iraq," *National Catholic Reporter* 38 (11 October 2002): 4 [database on-line]; available from ProQuest; accessed 14 November 2002.

⁷¹ Prange, 582-584. Churchill also expressed outrage, claiming the attacks on British possessions had occurred, "Without previous warning...[and in] flagrant violation of international law..." Churchill, 610.

⁷² "Estimated Costs of an Iraq War," undated; available from <http://usgovinfo.about.com/library/weekly/aaIraqWarCost.htm>; Internet; accessed 2 January 2003. The Congressional Budget office recently estimated that in a worst-case scenario, a war in Iraq would cost \$13 billion for the initial deployment, \$9 billion per month for combat operations, \$7 billion to redeploy, and \$4 billion per month for post-war temporary occupation.

⁷³ Grotius, xiv.

⁷⁴ Stuart Flensor and Leonore Hauck, eds. Random House Unabridged Dictionary, 2nd ed. (New York: Random House, 1993).

⁷⁵ Glennon, 554.

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